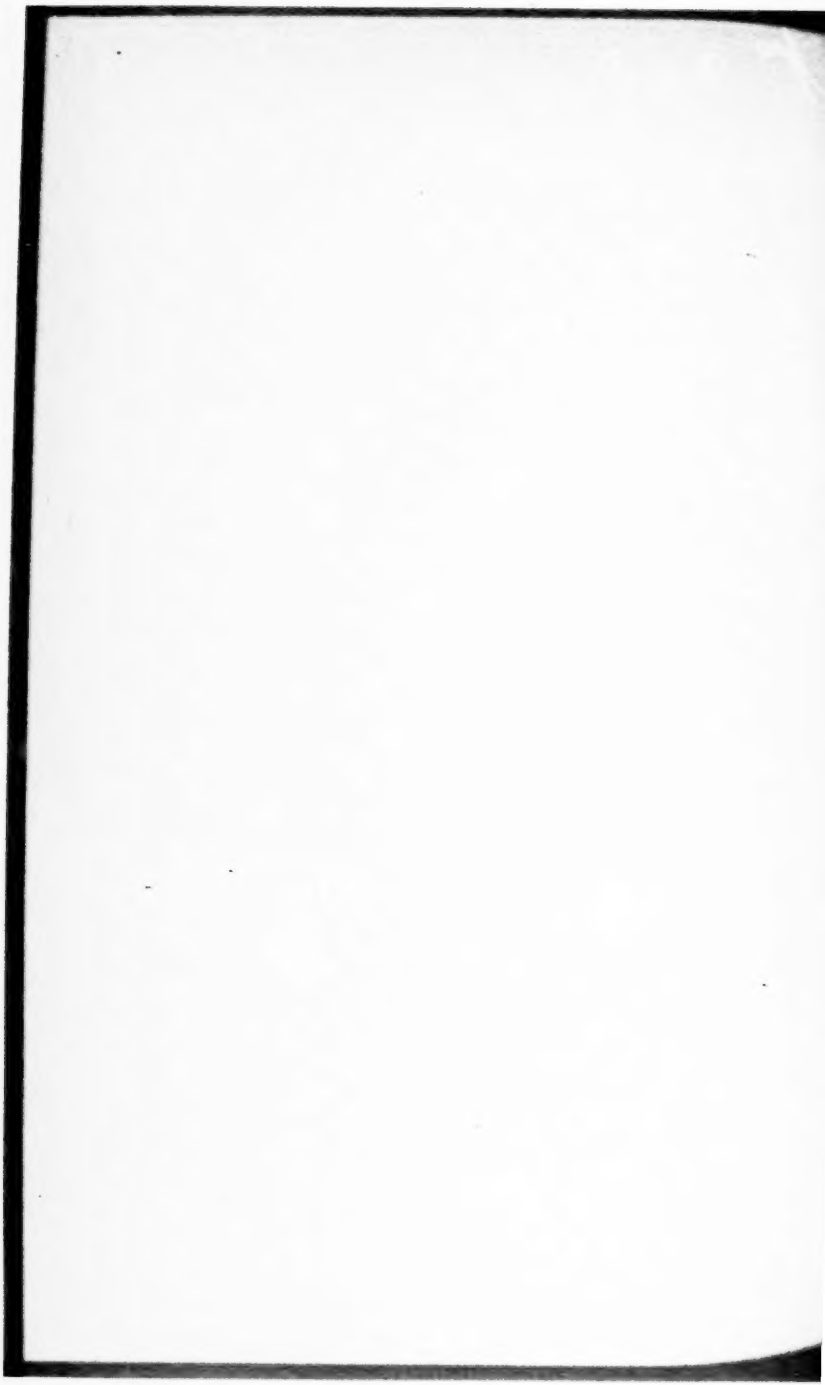

No. 245.

Brief of Plaintiffs in Error

SUPREME COURT, U. S.
FILED
APR 5 1900
CLERK.

Filed April 5, 1900.

# In the Supreme Court of the United States of America.

WILLIAM C. BROWNING, EDWARD W. DEWEY AND FRANCIS KING, the sole surviving partners composing the firm of Henry W. King & Co.; KATE TOOTLE, WILLIAM W. WHEELER, JOSHUA MOTTER AND FRANCIS S. DARRON, partners under the firm name of Tootle, Wheeler & Motter; THE CENTRAL NATIONAL BANK, of Topeka, Kansas, a national banking corporation; THE BANK OF TOPEKA, a corporation organized under the laws of the State of Kansas, and A. H. VANOE,

*Plaintiffs in Error.*

*against*

CHARLES H. DE FORD, *Defendant in Error.*

## BRIEF OF PLAINTIFFS IN ERROR.

Respectfully submitted,

JOHN W. SHARTEL,

Attorney for Plaintiffs in Error.

# In the Supreme Court of the United States of America.

WILLIAM C. BROWNING, EDWARD W. DEWEY AND FRANCIS KING, the sole surviving partners composing the firm of Henry W. King & Co.; KATE TOOTLE, WILLIAM W. WHEELER, JOSHUA MOTTER AND FRANCIS S. DAMERON, partners under the firm name of Tootle, Wheeler & Motter; THE CENTRAL NATIONAL BANK, of Topeka, Kansas, a national banking corporation; THE BANK OF TOPEKA, a corporation organized under the laws of the State of Kansas, and A. H. VANCE,

*Plaintiffs in Error.*

*against*

CHARLES H. DE FORD, *Defendant in Error.*

## BRIEF OF PLAINTIFFS IN ERROR.

### STATEMENT OF FACTS.

On the fifteenth day of December, 1890, the firm of William F. Wolf & Son were engaged in the business of retail merchants and operating a store at Oklahoma City and one at Guthrie, in the Territory of Oklahoma.

On that date they executed a joint chattel mortgage to A. H. Vance, D. A. Harvey, J. A. Clark, the Bank of Topeka, of Topeka, Kansas, the Central National Bank of Topeka, Kansas, Henry W. King & Co., of Chicago, Illinois, and Tootle, Hosea & Company (now Tootle, Wheeler & Motter) of St. Joseph, Missouri, in the sum of $22,048.54, which said chattel mortgage reads as follows (see printed record, page 21):

"KNOW ALL MEN BY THESE PRESENTS, that we, W. F. Wolfe & Son, parties of the first part, are indebted to A. H. Vance, D. A. Harvey, and J. A. Clark, the Bank of Topeka, Topeka, Kansas, the Central National Bank of Topeka, Kansas, Henry W. King & Co., of Chicago, Ills., Tootle, Hosea & Co., St. Joseph, Mo., parties of the second part, in the sum of $22,048.54, with interest on said sum as follows: $2,100 on note due Bank of Topeka, Topeka, Kansas, Jany. 28, 1891, with interest at ten per cent from maturity; $2,000 on note due Bank of Topeka, Topeka, Kansas, Nov. 22, 1890, with interest at ten per cent from the said date; $1,000 on note due bank of Topeka, Topeka, Kansas, December 15, 1890, with interest at ten per cent from said date; $5,000 on note due Bank of Topeka, Topeka, Kansas, Feby. 20, 1891, with interest at ten per cent from maturity; $1000 on note due Central National Bank, of Topeka, Kansas, Jany. 14, 1891, with ten per cent interest after maturity; $1,000 on note due Central National Bank of Topeka, Kansas, Dec. 15, 1890, with interest at ten per cent from said date; $1,000 on note due A. H. Vance, of Topeka, Kansas; $600 on note due A. H. Vance of Topeka, Kansas; $300 on note due A. H. Vance, of Topeka, Kansas, which, with interest, amounts at the present time to $2,300.00, $1,048.54 being the amount due Henry W. King & Co., of Chicago, Ills., as shown by two notes with interest on said amount from April 11, 1890, at 8 per cent interest; $1,000 balance on note

due November third, 1890, to Tootle, Hosea & Co., of St. Joseph, Mo. with interest at 9 per cent. from April 9. 1890; $2,800 due December 3, 1890, to Tootle Hosea & Co., of St. Joseph, Mo., with interest at 9 per cent from April 9, 1890; $2,800 due Jany. 3, 1890, to Tootle, Hosea & Co., of St. Joseph, Mo., with interest at 9 per cent from April 9, 1890. All of the above being promissory notes made by W. F. Wolfe and Lewis H. Wolfe, being the firm of W. F. Wolfe & Son, to the Bank of Topeka, State of Kansas; Central National Bank of the City of Topeka, State of Kansas, Henry W. King & Co., of Chicago, State of Illinois, and Tootle, Hosea & Co., of St. Joseph, State of Missouri.

"All of which notes except those made to him are signed by the said A. H. Vance as security; all of which said notes except those made to A. H. Vance and Henry W. King & Co., are signed by D. A. Harvey as security, and the note for $5000 to the Bank of Topeka is signed by J. T. Clark, as security; and this mortgage is made for the benefit of said banks and persons above named to cover said notes and all and any renewals of same, and to secure the payment of said money and protect said sureties from loss thereof.

"NOW, THEREFORE, in consideration of said indebtedness and to secure the payment of the sum as aforesaid, said parties of the first part do hereby sell, assign, transfer and set over to said parties of the second part the property owned entirely by them and without any encumbrance, and described in the following schedule, viz:

"The entire stock of dry goods, clothing, hats, caps, boots, and shoes, notions and gentlemens furnishing goods of said first parties now contained in the store building occupied by them and situated on the S. W. corner of Harrison Avenue and Division Streets, in the city of Guthrie, Oklahoma Territory, and also the entire stock of dry goods, clothing, hats, caps, boots and shoes, notions and gents furnishing goods of said first party now contained in the store building occupied by them,

and situated and described as follows: No. 220 and 222 Main Street, Oklahoma City, Oklahoma Territory, it being the true intent and meaning of the parties hereof to include and cover herein all goods, wares and merchandise of whatever kind and nature now contained in each of the said store buildings. Also all fixtures and furniture in each of the said store buildings.

"Provided, however, that if said debt and interest be paid as above specified this sale and transfer shall be void, otherwise to be in full force and effect.

"The possession of the said above described property is hereby surrendered to the said parties of the second part and the said parties of the second part shall sell the same at public or private sale with or without notice, and after satisfying the aforesaid debt and interest thereon and necessary and reasonable costs, charges and expenses incurred, out of the proceeds of sale, they shall return the surplus to the parties of the first part or their legal representatives, and if from any cause said property shall fail to satisfy said debt and interest as aforesaid, the said parties of the first part hereby agree to pay the deficiency.

"In witness whereof the said parties of the first part hereunto set their hands this fifteenth day of December, 1890.

"(Signed). W. F. WOLFE & SON.

"Witness signature, HARPER S. CUNNINGHAM.

"This instrument executed in duplicate.

(Endorsement). "Filed December 15th, at 8:45, 1890.

"LEWIS H. LAWS, County Clerk.

"Recorded December 30th, 1890, in Mort. record No. 1, pp. 127 and 128. Lewis H. Laws, County Clerk."

The mortgagees immediately took possession of the mortgaged property by W. L. Harvey, their agent, who at once proceeded to inventory the goods mortgaged (see inventories, pp. 15 to 107, inclusive, of the record). Shortly after the execution of the mortgage certain of the other creditors instituted attachment proceedings against W. F. Wolfe & Son and caused their writs of attachment to be levied on the mortgaged property, and the defendant, DeFord, as sheriff of Oklahoma county, and L. T. Shockey, as sheriff of Logan county, levied the attachments on the two stocks of goods, dispossessed the mortgagees, and the mortgagees each brought their several suits for the conversion of the property against both sheriffs.

On the 29th day of June, 1891, the parties entered into a stipulation (see record page 15), consolidating all of the suits into two cases, in one of which all of the mortgage creditors should appear on the record as plaintiffs and the sheriff of Oklahoma county should appear in one suit as defendant with respect to the stock of goods located in that county, and in the other of which suits the sheriff of Logan county should be the defendant.

And thereupon the plaintiffs in this action against Charles H. DeFord filed in accordance with the stipulation and the order of court, a consolidated complaint (see record, pp. 17 to 23 inclusive). To this complaint, the defendant, DeFord, filed his answer, seeking to justify the seizure of the goods under various writs of attachment

placed in his hands for service, and alleging in the first count of his answer that the indebtedness of each of the attachment plaintiffs was procured by W. F. Wolfe & Son by means of false and fraudulent representations as to their financial standing and credit, and that the indebtedness of the mortgage plaintiffs is fictitious and trumped up, and that the mortgage executed to the plaintiffs is not *bona fide*.

In another count the claim is made that the mortgagees, by reason of not bringing their suit for three months after the attachments were levied, and having full knowledge of the seizure of the property, waived their rights under section 4905 of article 40, entitled "Replevin," of the statutes of Oklahoma of 1890.

Another count of the answer states that the firm of William F. Wolfe & Son, which incurred the indebtedness to the mortgage plaintiffs, if any, was a different firm, being composed of William F. Wolfe, Louis H. Wolfe and Frederick W. Wolfe, and that the firm at Oklahoma City and Guthrie was composed only of William F. Wolfe and Louis H. Wolfe, and claiming that the new firm could not mortgage its assets to the prejudice of new creditors to creditors of the old firm.

Another count of the answer alleges that the mortgages were made to avoid the insolvent assignment laws, and was, in effect, an attempt to make a general assignment.

Other counts are contained in the answer making various allegations of fraud in the excution and delivery of the chattel mortgage.

The case was tried in the district court of Logan county to a jury, which returned a verdict in favor of the defendant. A motion for a new trial was filed, which was by the court overruled. The supreme court of the territory affirmed the judgment of the court below, and the opinion of the court was omitted from the original transcript since cretified here on stipulation and printed separately.

The case was tried upon two theories upon the part of the defendant sheriff and upon the part of the court. One of these theories is that if the firm of W. F. Wolfe & Son executed and delivered a chattel mortgage with intent to hinder, delay or defraud their creditors and the mortgagees took with knowledge of such intent, the mortgages would be void; and, second, that if the indebtedness to the attachment creditors was fraudulently contracted and the goods for which such indebtedness arose procured from such attaching creditors by means of false and fraudulent representations on the part of Wolfe & Son to such creditors, and the mortgagees took their mortgage with knowledge of fraudulent procurement of such goods upon the part of W. F. Wolfe & Son, the mortgages would be invalid as against such creditors as attachment creditors.

At pages 280, 282, 285, 268, 258 and 249 will be found certain letters which W. F. Wolfe, one of the attach-

ment debtors, wrote to the creditors under whose writs the sheriff acted and to other creditors, making certain representations as to the financial strength of the firm of W. F. Wolfe & Son, and upon the faith of which it is claimed the various debts upon which the attachment writs issued were contracted, which statements, it is claimed, were wholly false, and had the attachment plaintiffs known the truth they would not have extended the credit requested. These communications were objected to by the plaintiffs upon the ground, among others, of not being within the issues of the case, no proper foundation laid, and in no way binding upon any of the plaintiffs. These objections were overruled in each instance and these communications read to the jury over the exception of the plaintiffs.

There was no evidence introduced or offered that in any way tended to fix knowledge of the existence of these communications or of their contents upon either or any of the plaintiffs or that the plaintiffs, or either of them, had ever participated in making any representations as to the solvency of Wolfe & Son, and the only communication offered, in any way connected with any such transaction, is an application of one of the attachment creditors to the Bank of Topeka for information, under date of July 24, 1890, concerning the solvency of W. F. Wolfe & Son, and an endorsement on this letter by the cashier of the bank (see printed record p. 278), to the effect that "Wolfe & Son have removed to Oklahoma from Topeka; that the writer does

not know how much property they have, but thinks they would be considered slow pay." A. H. Vance, who acted for all of the mortgage creditors in taking the mortgage, testifies (p. 351 of the record), that he had no knowledge of the existence of any such letters at the time he took the chattel mortgage, as did also J. R. Mulvane, the president of the Bank of Topeka (see record p. 356). Edwin Knowles, in behalf of the Central National Bank of Topeka, testifies to the same (see record p. 360). D. A. Harvey, who also participated in the execution of the mortgages on his own account, being surety for W. F. Wolfe & Son on some of the notes secured by the mortgage, likewise denied knowledge of the letters, and none of the other mortgage creditors were in any way involved in the transactions except through A. H. Vance, claimed to be acting for them.

There is, therefore, a complete absence of proof of knowledge of any of the mortgage creditors and a complete denial of all personal participants in the taking of the mortgage, both principal and agents, of any knowledge of false representations ever having been made to any of the creditors by W. F. Wolfe & Son.

The plaintiffs in error rely in this court for a reversal of this case upon the following specific assignments of error numbered and lettered to correspond with their assignments of error set out at page 412 and 413 of the printed record, to-wit:

1st. The court erred in affirming the judgment of the court below.

2d. A. The court erred in admitting in evidence the letters of W. F. Wolfe & Son to their various creditors which are here claimed to be false and fraudulent, written by W. F. Wolfe & Son to such creditors as a basis to obtaining credit. In these letters W. F. Wolfe & Son in July, 1890, make statements of their property and indebtedness showing a net worth over all liabilities ranging from thirty to forty thousand dollars.

2nd. E. The trial court erred in giving and the Supreme Court of the Territory erred in affirming instruction number two herein set out in full and that part of which complaint is made in this court, being italicized.

"2. The defendant admits that he took possession of the property claimed by the plaintiff, but by way of defense claims that he was sheriff of Oklahoma county, in this Territory, and was acting as such officer under process issued out of this court in two cases, in one of which M. D. Wells & Co. were plaintiffs and W. F. Wolff & Son were defendants, and the other in which Burnham, Hanna, Munger & Company were plaintiffs, and W. F. Wolff & Son defendants; that the property so taken under the process of the court was not the property of plaintiffs, and that they had no right to the possession thereof, for the reason that the mortgage under which they claimed was invalid, for the reason that the firm of W. F. Wolfe & Son at the time they executed the said mortgage were indebted *to said M. B Wells & Co. and Burnham, Hanna, Munger & Co., and a large number of other wholesale creditors, for goods fraudulently procured from them of which said plaintiffs had knowledge at the time of the execution and receipt of said mortgage,* and for the further reason that at the time the plaintiffs took said mortgage their indebtedness against

Wolfe & Son was amply secured; that the same was not taken in good faith, but to aid said Wolfe & Son to cheat and defraud their said other creditors and to hinder and delay them in the collection of their claims; that the real object in the taking of said mortgage was for the purpose of securing D. A. Harvey, A. H. Vance, and J. T. Clark, near relatives to the members of the firm of W. F. Wolfe & Son, on account of their having signed the notes of Wolfe & Son, and not in good faith, to secure the indebtedness of the Wolfes to these plaintiffs."

2d. F. The trial court erred in giving and the Supreme Court of the Territory erred in affirming instruction number three herein set out in full and that part of which complaint is made in this court, being italicized.

3rd. The burden of proof is upon the plaintiffs to show:

"1st That the chattel mortgage was executed to them, to secure a bona fide indebtedness existing at the date of the execution of said mortgage and owing from Wolfe & Son to said plaintiffs; and,

"2d. To further show that at the time of the attachments of defendants were levied upon the stock of goods said plaintiffs in person or by agent, were in the actual possession of said goods, or that chattel mortgage was on file in the office of the register of deeds of Oklahoma county; and,

"3d. To show that the goods seized upon under the attachment writs were the identical goods described in the mortgage of plaintiffs."

If the plaintiffs shall have established these facts, then, in order to defeat their recovery, the burden of proof shifts to the defendant to show:

*1st. That said Wolfe & Son were guilty of fraud in contracting the debts, to satisfy which writs of attachment were levied; and*

*2d. To further show that the plaintiffs were parties to such fraud; and if the defendants shall fail to so establish either of these propositions you must return a verdict for plaintiffs.*

2d. J. The trial court erred in giving and the Supreme Court of the Territory erred in affirming instruction number eight herein set out in full and that part of which complaint is made in this court, being italicized.

8. "In order to invalidate the chattel mortgage it is not enough for the defendant to show simply that the firm of W. F. Wolfe & Son fraudulently purchased goods of the attaching creditors, but it must also appear from the evidence that the plaintiffs in this case were parties to such fraud; that they were either active participants in such fraud, or that they aided and abetted in such fraud, or that such *plaintiffs at the time they took such mortgage actually knew that Wolfe & Son had fraudulently incurred a liability and debt for the goods or a portion thereof described in the chattel mortgage.*"

2d. K. The trial court erred in giving and the Supreme Court of the Territory erred in affirming instructruction number nine herein set out in full, that part of which complaint is made in this court, being italicized.

9. "By aiding and abetting is meant such acts as are intentionally done which encourage or assist to such an extent as will in some manner bring about a given result, and unless you find from the evidence that the plaintiffs, with the intent to defraud the attaching creditors, did some act to defraud such creditors or aided and abetted Wolfe & Son to so defraud (*or had actual knowledge that the goods described in the mortgage had been by Wolfe & Son fraudulently obtained*) *you must return a verdict for the plaintiffs.*"

2d. L. The trial court erred in giving and the Supreme Court of the Territory erred in affirming instruction number twelve herein set out in full, that part of which complaint is made in this court, being italicized.

"*12. You are instructed that before a party can annul or treat a contract of sale as void, by reason of the false or fraudulent representations used in inducing the party to sell the goods, it must appear from the evidence that the alleged false or fraudulent representations were made regarding something which had already transpired or was then alleged to exist. No statement of one's opinion as to what will or will not happen or exist in the future can affect a contract of sale or render it void. Every person in making a contract is at liberty to speculate or express opinions as to future events, and he cannot be held to answer for their truth or falsity.*"

2d. M. The trial court erred in giving and the Supreme Court of the Territory erred in affirming instruction number thirteen herein set out in full, and that part of which complaint is made in this court, being italicized.

"*13. You are instructed that any wilful misrepresentation of a material fact, made with a design to deceive another and to induce him to enter into a trade he would not otherwise make, will enable the party who has been defrauded to annul the contract, and it makes no difference whether the party making the misrepresentations knew them to be false or whether he was ignorant of the fact stated, provided the matter stated was material and the party making the statements stated them as true, when in fact he had no apparently good reason for believing it to be true, and when the other party, under the circumstances shown by the evidence, was reasonably justified in relying upon the statements and did rely upon them in selling the goods and was deceived*

*or injured thereby. Whether in this case William F. Wolfe & Son or either of them made the fraudulent and false representations alleged, and whether they were false, and, if so made, whether they were made for the fraudulent purpose alleged and were relied upon by the defendants in the sale of their goods, are questions exclusively for the jury, to be determined by the weight of the evidence in the case."*

2d. O. The trial court erred in giving and the Supreme Court of the Territory erred in affirming instruction number sixteen herein set out in full, and that part of which complaint is made in this court, being italicized.

16. "You are instructed that under the law a party who transacts business through an agent is bound by the acts of such agent, if done within the scope of the authority of the agency, and the acts of the agent are the acts of the principal, and you are further instructed that where an agent acts beyond the scope of his authority and his acts are afterwards ratified by his principal, the acts of the agent become the acts of the principal and the principal is not permitted to claim and retain the benefits of the agent's acts in part and repudiate the same in part, and if he claims the benefits which accrue from the act, he must likewise assume the burdens and responsibilities which are attendant thereon, and you are instructed that a debtor cannot, under a mere pretense of securing a debt, convey more property than is reasonably necessary for that purpose, if such debtor is in insolvent circumstances, and if the debtor does such act with the intent to secure to himself a portion of the property and baffle his creditors, and if the evidence shows that W. F. Wolfe & Son undertook, in giving the chattel mortgage, to secure an indebtedness which did not exist in fact (or if the evidence shows that at the time such mortgage was given *the agent who took the mortgage—if such agency ex-*

*isted—knew that W. F. Wolfe & Son had fraudulently purchased the goods given to secure the indebtedness named in the mortgage), or if any of said mortgagees were parties to a fraudulent transaction of W. F. Wolfe & Son in the purchase of such goods,* then the mortgage given in this case is invalid as to each of plaintiffs who participated in such fraud, and the jury should so find."

2d. The court erred in overruling plaintiff's motion for a new trial.

2d. T. The court erred in rendering judgment on the verdidct.

4th. The court erred in holding, as a principle of law that where goods have been fraudulently obtained by means of false representations as to the financial standing of the debtor, and where such creditors elect to sue for the purchase price of such goods and proceed by the attachment of the property claimed to belong to the debtor, that a party previously taking a mortgage on such goods to secure an antecedent debt with knowledge of such fraudulent representations must surrender such property to attachment creditors.

## ARGUMENT.

THE COURT BELOW ERRED IN ITS TREATMENT OF THE QUESTION ATTEMPTED TO BE RAISED THAT W. F. WOLFE AND SON HAD FRAUDULENTLY CONTRACTED THE DEBT OF THE CREDITORS UNDER WHOSE WRIT THE DEFENDANT ATTEMPTED TO JUSTIFY IN THE FOLLOWING PARTICULARS, TO-WIT:

1ST. IN ADMITTING IN EVIDENCE THE REPRESENTATIONS MADE BY W. F. WOLFE & SON TO SUCH CREDITORS WITHOUT ANY PROOF OF PARTICIPATION THEREIN BY THE MORGAGE CREDITORS OR EITHER OF THEM AND WITHOUT ANY PROOF OR KNOWLEDGE OF NOTICE ON THEIR PART OF SUCH REPRESENTATIONS HAVING BEEN MADE.

2D. IN SUBMITTING THE QUESTION TO THE JURY IN THE ABSENCE OF SUCH PROOF OF PARTICIPATION OR NOTICE OF SUCH FALSE REPRESENTATIONS ON THE PART OF THE PLAINTIFFS.

3D. IN SUBMITTING THE FRAUDULENT PROCUREMENT OF CREDIT FROM THE ATTACHMENT CREDITORS BY THEIR DEBTORS AS A DISTINCTIVE GROUND OF DEFENSE IN A CON-

TEST BETWEEN THE MORTGAGE CREDITORS AND THE ATTACHMENT CREDITORS OF THE SAME PROPERTY.

4TH. IN GIVING THE SHERIFF THE STATUS UNDER HIS WRIT OF ATTACHMENT THAT HIS CREDITORS WOULD HAVE HAD UNDER A WRIT OF REPLEVIN IN DISAFFIRMANCE OF THE SALE FROM THE ATTACHMENT CREDITOR TO THE ATTACHMENT DEBTOR.

FIRST. THE COURT ERRED IN ADMITTING IN EVIDENCE THE REPRESENTATIONS MADE BY W. F. WOLF & SON TO THEIR CREDTIORS WIHOUT PROOF OF PARTICIPATION THEREIN BY THE MORTGAGE CREDITORS, AND WITHOUT ANY PROOF OF NOTICE ON THEIR PART OF SUCH REPRESENTATIONS HAVING BEEN MADE.

SECOND. THE COURT ALSO ERRED IN SUBMITTING THE QUESTION TO THE JURY IN THE ABSENCE OF SUCH PROOF OF PARTICIPATION OR NOTICE OF SUCH FALSE REPRESENTATIONS ON THE PART OF THE PLAINTIFFS.

The record in this case will be searched in vain for the slightest clue indicating in the remotest degree any notice or knowledge on the part of either or any of the mortgagees, or either or any of the agents taking such mortgage in their behalf, of any fraudulent representations made by Wolfe & Son to their other creditors. The record stops short with the proof of the making of such

representations by W. F. Wolfe. Indeed, one of the attachment creditors applied to the cashier of the plaintiff, the Bank of Topeka, for information with regard to W. F. Wolfe & Son, and instead of receiving information that would be calculated to inspire confidence, received a statement calculated to inspire distrust. See letter of J. W. Thurston above referred to. The case in this phase of it presents the spectacle of the admission of important evidence calculated to prejudice the minds of the jury in a very high degree against the plaintiffs without any foundation being laid for its introduction in any way connecting the plaintiffs therewith, and in submitting that same hypothesis to the jury without the slightest evidence to support it. In this respect the learned court below committed even a graver error than the trial court.

In the case of Jaffrey vs. Wolfe, 4 Ok., 303, Wolfe made a motion to discharge the attachments which had been levied against him upon the ground that the affidavits charging him with fraud upon which the writs issued were untrue. To these actions none of the present plaintiffs were parties, nor in any way involved, but in that case the Supreme Court of the Territory in deciding in favor of the validity of the attachments and that Wolfe & Son were guilty of sufficient fraud to sustain such attachments, dispensing with the necessity of the presence of the mortgage creditors upon the record, also assumed jurisdiction to decide the cause as though they were parties and held their mortgage to be invalid.

and that they had ample notice of all of the fraudulent acts of Wolfe & Son. In the opinion in the present case the right of the plaintiffs to complain of the sufficiency of the evidence on the question of notice was deemed to be foreclosed and adjudicated by the former case of Jaffrey vs. Wolfe, to which they were not parties, and the court below, in the present case, instead of dealing with the evidence as presented by this record and its sufficiency to warrant the consideration by the jury of the claim that Wolfe & Son had procured credit of the attachment creditors by means of false representations, and that the plaintiffs had notice of such facts, referred to the case of Jaffrey vs. Wolfe as being final on that question.

On the point that the court erred in submitting this question to the jury upon this hypothesis, we cite:

Ency. Pleading and Practice, v. 11, p. 161.

THIRD. THE COURT ERRED IN SUBMITTING THE FRAUDULENT PROCUREMENT OF CREDIT FROM THE ATTACHMENT CREITORS AS A DISTINCTIVE GROUND OF DEFENSE IN A CONTEST BETWEEN THE MORTGAGE CREDIORS AND THE ATTACHMENT CREDITORS OF THE SAME PROPERTY.

FOURTH. IN GIVING THE SHERIFF THE STATUS UNDER HIS WRIT OF ATTACHMENT

THAT THE PLAINTIFFS IN SUCH WRIT WOULD HAVE HAD UNDER A WRIT OF REPLEVIN SEEKING TO RESCIND THE SALE.

In the second instruction the jury are told that the defendant's principal defense rests in the claim that the attachment creditors have been defrauded of their goods by W. F. Wolfe & Son, and that the plaintiffs at the time of taking their mortgage knew it.

In the tird instruction the jury were told that if the defendant established such facts the verdict should be for him.

In the eighth instruction the jury are told that the existence of such facts would invalidate the chattel mortgage.

In the ninth instruction this proposition was repeated in substance.

In the eleventh instruction what would amount to a fraudulent procurement by Wolfe of the property of the attachment creditors is defined and such acts declared frauds in fact upon the vendor.

In the twelfth instruction, and also in the thirteenth instruction, the jury are told, in substance, that if the false representations were made and were relied upon, that the vendors would be entitled to annul their contract of sale to W. F. Wolfe & Son.

In the sixteenth instruction the jury are told that if such fraudulent representations were made, and the agent who took the mortgage had knowledge thereof, the mortgage would be invalid and the jury should so find.

The learned court below conceived the effect of this charge to be merely a submission to the jury of this question as a probative fact on the question of fraud or good faith on the part of the mortgage creditors in taking the mortgage, saying:

"That goods were fraudulently obtained from the attaching creditors was neither pleaded nor proved by the defendants for the purpose of establishing indepedently therefrom a right of recovery or as in itself absolutely establishing a defense, but was pleaded and proven as a probative fact tending to establish the real fact in issue, to-wit, whether the mortgage under which the plaintiffs were claiming was fraudulent and void as to creditors."

Whatever intention the learned court below may have imputed to the defendant in making such proofs, the trial court submitted the case on no such theory. He did not tell the jury that the frauduent procurement of the goods was a fact they could take into consideration in determining whether the mortgagee's intentions and conduct were fraudulent in and about the transaction, but he did succinctly inform the jury, at least five times in the course of his charge, that if the goods were fraudulently procured and the plaintiffs knew it, they should find for the defendant. The court did not treat the circumstances as a probative fact, but plainly informed the jury that the facts, if proven, constituted a complete defense to the action. In this respect the learned court below has entirely misconstrued the charge of the trial court.

Again, the court below, in describing the theory upon which the defendant tried the case, says:

"He asserts that no title to the property other than a voidable or defeasible title passed from the attaching creditors to the mortgagors, and that such title being voidable and defeasible, no title thereto would pass to the mortgagees unless they were *bona fide* mortgagees."

This position is utterly untenable under the law.

Will counsel claim that this sheriff after levying on this property as the property of his debtor, and declaring thereby that he had an attachable interest therein, be permitted to claim that they had no transferable interest? Will they claim that the action of the creditors in attaching did not ratify the sale from the beginning and give the vendee a perfect and not a voidable title from the beginning? Will they even contend that after the levy of the attachment writs sued out upon grounds the disclosures of which also disclosed a full knowledge of all their rights at the time of electing that remedy, that the attachment creditors could have dismissed their attachments and maintained an action to recover the property of which they claimed they were defrauded even in the hands of W. F. Wolfe & Son?

If one of the attachment creditors under whose writ the sheriff justified had, instead of attaching, instituted a suit in replevin, the charge in the present case would afford complete material to furnish an instruction covering every point in the case correctly or incorrectly stated, and the entire decision of the court below is based upon an erroneous construction of the entire import of the charge. The fact cannot be masked that the defendant was allowed to approbate and reprobate, and that in a single proceeding, and at the same time,

and that he gained all the substantial advantages that an action in replevin would have given his creditors had they sought to rescind their contract of sale and implanted the same equity upon other porperty of the debtor than that of which they had been defrauded.

We contend that *our abstract propositions of law*, the soundness of which the court below admits, apply in the concrete to the facts of this case. They have been applied to the precise state of facts involved in this record in two very well considered cases cited in our brief in the court below and not noticed in the opinion. We refer the court to the decision of the supreme court of Missouri in the case of Stokes vs. Burns, 33, S. W. Rep., 460, in which the attaching creditors proved that the mortgage creditors participated in the making of the false representations which secured the granting of credit, and had knowledge at the time of the taking of their mortgage of the fact of such false representations having been made by the debtor to his other creditors, and in such respect only differs from the case at bar. It was held that a creditor may take a mortgage in good faith, even though the mortgaged property had been fraudulently procured and the mortgagee knew it, where the vendor, instead of seeking by appropriate remedy to rescind the sale, sues for the price of the goods and proceeds by attachment.

In the opinion of the court it is pertinently suggested: "Again, in this case the alleged fraud on the part of defendant in procuring the property, whether of

plaintiff or the other attaching creditors, was wholly immaterial. The plaintiff, by suing upon his account, waived the fraud in the sale and treated it thereby as the property of the defendants, with the same power of disposition in defendants over it as of any other property owned by them.' So also in a case precisely like this—O'Donald vs. Constant, 82 Ind., 212—it is held that where a vendor claims to have been defrauded by his vendee, and the vendee has appropriated the goods so obtained in payment or security of other debts, and the vendor seeks to recover by attachment of the vendee's property, he affirms the vendee's title and places himself in the position of an ordinary creditor and entitles himself to impeach the sale or mortgage on no other ground than those equally available to other creditors.

The above rulings are in consonance with all the authorities dealing with the principle of sales and the election of remedies by vendors. Where the right of recision exists in the vendor, a suit for the price affirms the sale and obliterates every infirmity existing in the vendee's title. The case of Bach vs. Tuck, (N. Y. Ct. App.), 26 N. E. Rep. 1019, is decisive of this case on principle. It was there held that an attachment suit based on an affidavit that the goods had been fraudulently procured was such an affirmance of the sale that a subsequent action could not be maintained seeking to reclaim the goods and to rescind the sale, and that the attachment affidavit, based on such ground, con-

clusively proved an election, with full knowledge, to affirm the sale and treat the goods as unqualifiedly the property of the vendee. Even in conditional sales, where the vendor who reserves title brings suit or levies an execution or writ of attachment upon the property which, by the terms of the sale, he retains title, it is an abandonment of every vestige of title and has the effect of vesting absolute title in the vendee. Thus, in Thomason vs. Lewis, (Ala.), 15 So. 830, it is held that if the vendor by attachment or execution against the vendee, levies on the property as belonging to the vendee, he will be deemed to have abandoned his claim; citing Lehman vs. VanWinkle, 92 Ala. 443, 8 So. 872; Engine Co. vs. Hall, 89 Ala. 628; 7 So. Rep. 187; Dowdell vs. Lumber Co., 84 Ala. 316; 4 So. Rep. 431; Iron Works vs. Smith, 13 So. Rep. 525; Evans Sheriff, vs. Rothschild, 54 Kans. 747, 39 Pac. Rep. 701. It is held that where a party having full knowledge of all of the material facts affecting his rights with reference to goods sold by him to a purchaser who is charged with having obtained them fraudulently and intending never to pay for them, sues for the purchase price of the goods, he thereby elects to affirm the sale and cannot thereafter maintain an action to recover the specific property because of the fraudulent purpose of the purchaser. The supreme court of Nebraska, in the case of First National Bank vs. McKinney, 66 N. W. Rep. 280, in passing on a similar question, says:

"A vendor who is induced to part with the pos-

session of property through the fraud of a purchaser has his election to rescind the contract and reclaim the property sold or to ratify the sale and pursue his ordinary remedy by action ex contractu, but such remedies are not concurrent and by electing to pursue one, with knowledge of the facts, he waives his right to pursue the other."

Citing Morris vs. Rexford, 18 N. Y., 552; Rodermund vs. Clark, 46 N. Y., 334; Bach vs. Tuck, (N. Y.), 26 N. E. 1019; Shoe Co. vs. Block, (Ark.),12 S. W., 1073; Herman on Estoppel, Sec. 1051.

As illustrating other phases of the doctrine of election as applicable to this case, VanWinkle Co. vs. Crowell, 146 U. S., 42, is instructive. It is there held that a suit to enforce a mechanic's lien for machinery sold waived a claim of conditional sale by which title remained vested in the vendor.

In direct affirmance of the principles we are contending for, we also cite:

Wachsmuth vs. Simms, 32 S. W. Rep., 821;

Park & Lacy Co., vs. White River Co., (Cal.), 35 Pac., 442.

The case of Terry vs. Munger,. (N. Y.), 24 N. E R., 272, holds that where parties wrongfully detach and carry away machinery belonging to plaintiff and he sues them on an implied contract of sale, such action on the part of the plaintiff passes a perfect title to the wrongdoers to the property so wrongfully taken, and that the

election is final and that suit cannot be subsequently maintained for the purpose of recovering the property so taken.

The case of Kolsky vs. Loveman, 12, So. Rep., 720, further illustrates the proposition that equities preceding a sale cannot be tacked to an attachment suit. The plaintiff had there sold a certain property retaining title in himself. Instead of reclaiming the property on default, he sued for the purchase price and attached. A claim of exemption was asserted by defendant of the attached property, and the plaintiff asserted his specific claim on the property as a bar to the claim of exemption. It was held that it could not be done and that the attachment suit waived all title to the property in the plaintiff; citing Crossman vs. Rubber Co., (N. Y. App.), 27 N. E. Rep., 400; S. C. 13, Law. Rep. Ann., 91, and authorities quoted in note; Bigelow on Estoppel, pp. 601-604; 6 A. & Eng. Ency. of Law, pp. 2 and 32; Field vs. Langsdorf, 43 Mo., 32.

We also cite Lowenstein vs. Glass, (La.), 20 So., 890; and Fuller vs. Eanes, 19 So., 366.

We believe that no authority can be found which will hold that when such a vendor with full knowledge of the facts as is disclosed here sues for the purchase price and attaches the property so procured as the property of the vendee, such vendor cannot assert in support of such attachment in a contest with the mortgagee that the mortgage is invalid by reason of such facts and by reason of the mortgagee's knowledge

thereof at the time of taking his mortgage. The leading cases cited are well reasoned and are well supported in principle as disclosed by the other authorities cited. The remedies of the vendors of these goods were not concurrent but were inconsistent. But the court instructed the jury just as though these plaintiffs on one branch of the case were seeking to retake their goods and just as a court would instruct a jury if that had been all there was in the case, thereby giving them the advantage dreived from a replevin suit to retake their goods and at the same time gave them the status of attaching creditors seeking to impeach a mortgage on the same property upon the allegation that it was not executed and received in good faith. No matter how honest the motives of the parties to the mortgage transaction might be considered as an independent transaction, if the mortgagees knew that the mortgagor had acquired title to a part of the mortgaged property wrongfully, the court, by the instructions in question, not only gave them a superior right to the goods of which they had been wronged, but a superior right to a mortgage in good faith of goods not purchased of the attaching creditors and in which the right of disposition in such mortgagor would be unquestioned.

We submit, that the law will not permit a party to drive a replevin and an attachment suit, growing out of the same transaction, abreast in a single proceeding.

## ON THE MOTION TO DISMISS.

The present motion to dismiss was made in the court below, see printed record p. 405. The record also contains the suggestions made against it by the plaintiffs in error, which will be found in the printed record at page 408. To what is there said we have very little to add, except to call the court's attention to the substantial admission made in the motion of the defendant in eror below, on page 405, to the substantial effect that by a clerical mistake in the exception to the order overruling the motion for a new trial the word "defendants" is written for "Plaintiffs." In the motion in the court below defendant in error says:

"Just how this came, we are not able to state, but it will be observed that it was the plaintiff's motion for a new trial and that the ruling of the court thereon was adverse to the plaintiffs. Therefore, the exception should have been saved by the plaintiffs and not by the defendants. *It may be, and perhaps is, that this was a clerical error*, but it will be seen from the authorities cited below that it is an error which cannot be cured."

The strength of this admission, coupled with a rule laid down in Edmonson vs. Beals, 27 Kansas, 656, "mere clerical errors in a record brought to this court for review will always be disregarded," amply justified the action of the court below in overruling the motion of defendant in error to dismiss the case. We do not deny that under the law regarding the practice in making cases for review under the code of the Territory, that a case-

made once settled cannot be amended, but we do deny that there is any rule of captious or narrow construction of such a record, and if the exceptions were necessary at the point where the exception in question is located, it is sufficiently manifest that the exception in question is an exception taken by the plaintiffs in error to warrant this court in treating it as such. Were it otherwise, the second exception, found at the close of the same entry, see record page 402, to which said judgment and each and every part thereof the said plaintiffs and each of them duly excepted and except would still be sufficinent to reach the ruling on the motion for a new trial, and is a technically correct exception under the statutes of the Territory. By section 313, Oklahoma Code of Civil Procedure, it is provided:

"No particular form of exception is required."

By section 314, same, it is provided:

"Where the decision objected to is entered on the record and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted at the end of the decision that he excepts."

The recitation of an exception duly taken as a recitation of a fact and not purporting to give the language of the exception itself, is correct under the Kansas practice, even though it runs to numerous preceding subjects.

K. P. Ry. vs. Nichols, 9 Kans., 235.

Bard vs. Elston, 31 Kans., 274.

The word "judgment" and each and every part thereof as used in the latter exception, refers to the entire entry.

We also observe that counsel for defendant in error is mistaken in the statement that no error is assigned in this court to the rendition of the judgment itself, as that speciffic assignment is made in subdivision "I" of the second assignment of errors, see record page 413.

Respectfully submitted,

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